No. 94-616

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

IN RE ZAPATA PROTEIN, (USA) INC.
(formerly known as ZAPATA HAYNIE CORPORATION),

Petitioner,

versus

JOHN WILLIAM BUTLER,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF ZAPATA PROTEIN, (USA) INC. (formerly known as ZAPATA HAYNIE CORPORATION)

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PRELIMINARY STATEMENT

Rule 15.7 of this Court allows the filing of supplemental briefs while the Petition for Writ of Certiorari is pending, as long as the supplemental brief addresses intervening matters not available at the time of the parties' last filing. As a result of the response brief filed on behalf of John William Butler, this Court is now called upon to determine, in connection with the Court of Appeals' award of prejudgment interest, whether Louisiana's statute allowing for trial by a Judge alone, at the plaintiff's discretion, creates a "state admiralty jurisdiction."

ARGUMENT

Respondent John William Butler argues in his response brief that, solely because of his trial court election to proceed without a jury, he is entitled to recover prejudgment interest on his Jones Act Claim even though his general maritime law claims were dismissed. This position necessarily requires Butler to assert inferentially that Louisiana's procedural choice in this regard places Louisiana trial judges on the same level as Article III Federal judges sitting in admiralty.

Because Louisiana is not free to fashion such a remedy, prohibited by Article III of the Constitution and this court's decisions in *Southern Pacific v. Jensen*,[1] and *American Dredging*

[1] 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

Co. v. Miller,[2] Butler's claim is without merit. Consistent with Butler's response to the other issues raised in the application, he would have this Court superficially focus on language in statutes and prior cases which, on the surface, support his position but ignore the fundamental questions which exist upon closer examination. In each case, his response brief, instead of creating doubt as to the wisdom of granting Zapata's application, supports such action by this Court.

A. Even though Louisiana's procedural device allowed for the trial of this case by a judge alone, Butler's claim remained one "at law."

Butler confuses the procedural denial to Zapata of a jury trial[3] with the creation of admiralty jurisdiction in state court. Since the Federal Constitution provides a grant of judicial power to "all Cases of Admiralty and Maritime Jurisdiction,"[4] whatever effect the statute may have, it cannot include such a creation.

If it does not, Butler's claim remains one brought "at law." Section 9 of the Judiciary Act of 1789 enacted the first "Savings Clause," which had the effect of providing concurrent jurisdiction to state and federal courts, not of admiralty and maritime claims, but only claims asserting a " . . . common law remedy, where the common law is competent to give it."[5]

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[2] ___ U.S. ___, 114 S.Ct. 981 ___ L.Ed.2d ___. (1994).

[3] See La. Code of Civil Procedure Art. 1732 (6) at page 4 of Zapata's application.

[4] U.S. Constitution, Article III, Section 2.

[5] 28 U.S.C. 1333, prior to the 1948 amendment; *see also* discussion in *Linton v. Great Lakes Dredge and Dock Co.*, 964 F.2d 1480 (5th Cir. 1992) at pp. 1484-1487.

Prior to the statute's amendment in 1948, this Court said:

> "The 'right of a common law remedy' so saved to suitors, does not . . . include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or redress the injury involved.[6]

Even though the clause now specifically saves " . . . all other remedies to which [suitors] are otherwise entitled . . . ,"[7] this Court has preserved the distinction between admiralty and "common law," or in this case general maritime law, claims.[8] Commenting on that decision, Professors Gilmore and Black suggest that the change in language was, except in certain limited circumstances, inconsequential.[9] Finally, a claim that a Louisiana trial judge enjoys a status equal to that of a federal district judge in disposing of admiralty matters was specifically rejected on a removal question in *Linton, supra* at footnote 5.

Thus, Butler's claim began as a saved, "at law" claim brought under the state court's concurrent jurisdiction. It

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[6] *Red Cross Lines v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L. Ed. 582 (1984).

[7] 28 U.S.C. 1333, as amended.

[8] *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954).

[9] Grant Gilmore and Charles L. Black, *The Law of Admiralty*, Sections 1-13 (2d Ed. 1975).

never adopted any other character, regardless of the procedural incidents attached to his claim by Louisiana law, because that would have been prohibited by this Court's clear jurisprudence and by the Constitution itself.

B. If Butler's claim remained one "at law," absent a finding of unseaworthiness or other general maritime law negligence, he is prohibited from an award of prejudgment interest.

Butler relies, in the main, on a Louisiana appellate case from the same circuit as the opinion questioned here in support of his proposition that trial by a judge alone creates a different theoretical premise for the award of prejudgment interest. His reliance is misplaced.

First of all, the decision of the Court of Appeal in that case affirmed a finding of unseaworthiness of the vessel, the general maritime law basis for the award of interest, which Butler lacks here.[10] Thus, even though the Court's opinion made reference to the distinction between judge trials and jury trials,[11] such an exercise was unnecessary. McFarland was entitled to prejudgment interest because he won his unseaworthiness claim. Butler is not entitled to prejudgment interest because he lost on that claim and because his case remains one brought "at law" as far as his Jones Act remedies are concerned.

As pointed out in the original petition, this distinction is one of great significance because even Louisiana

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[10] *McFarland v. Justiss Oil Co., Inc.*, 526 So.2d 1206 (La. App. 3d Cir. 1988), at p. 1208.

[11] *E.g.* at p. 1215.

courts have unanimously recognized the difference between availability of prejudgment interest in a saved state court action brought pursuant to the Jones Act and one which awards damages on both the Jones Act and unseaworthiness counts.[12] In so doing, Louisiana follows the "general rule" of the federal courts, which allows prejudgment interest only when the case is tried to a judge alone, sitting as a federal admiralty court.[13]

Since federal jurisprudence addresses issues directed not towards a judge-jury distinction, but the bright line between admiralty and at law claims, its theoretical basis is more clear:

> [Plaintiff] also maintains that he is entitled to an award of prejudgment interest. Since [plaintiff] did not prevail on his unseaworthiness claim, his sole basis for recovery is Jones Act negligence. It is well settled that in actions at law under the Jones Act, the recovery of prejudgment interest is not permitted.[14]

CONCLUSION

Butler's response brief points out perhaps better than Zapata's application the extent to which Louisiana jurisprudence may be twisted to achieve an anomalous result.

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[12] See Cases cited at Footnote 22 of the original application.

[13] *See, e.g., McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529 (5th Cir. 1987); *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877 (5th Cir. 1984); *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985).

[14] *Theriot, supra*, at p. 883.

He would have this Court ignore the actions of Louisiana's state court system and focus instead on the language to which they give lip service to do great violence to the maritime law.

Because Louisiana appellate review equates "manifest error" and "clear error" review, Butler urges, this Court should ignore a unique state constitutional provision which obviously gives its courts the authority to reverse decisions on the facts, even in the face of such language.

Because Louisiana has created a procedural system which deprives Jones Act defendants of their right to a jury trial, Butler would have this Court believe state judges are demi-Article III factfinders sitting in quasi-admiralty. There can be no other meaning. If Butler contends he is entitled to an award of prejudgment interest, absent a finding of unseaworthiness, he must, of necessity, contend Louisiana has achieved this unique status by passing a procedural statute.

This case, then, is not an argument between several states on one side and several states on the other, or a conflict between federal circuits. It is a conflict between Louisiana and everyone else. Because of Louisiana's historically large involvement in the maritime arena, the decision of the Court of Appeal, if allowed to stand, cannot help but have a substantive effect on the national law.

To prevent this, Zapata's application should be granted, and the Court of Appeal reversed in its entirety.

Respectfully submitted,

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